

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
	:	
	:	88-358
v.	:	
	:	
	:	
RODNEY GREENE	:	

**MEMORANDUM AND ORDER**

Before the court is Defendant Rodney Greene's pro se Nunc Pro Tunc Motion to Correct Illegal Sentence (Docket No. 87), the Government's Response in Opposition, and Defendant's Reply. In his motion, Defendant seeks to challenge his criminal sentence from his conviction on Count 13 of the indictment as unlawful under 18 U.S.C. § 3561(a)(3). He also appears to claim ineffective assistance of counsel for failing to appeal Defendant's sentence on Count 13. He alleges that a conflict of interest existed between him and his counsel at a Violation of Probation Hearing on October 15, 1993, when Defendant's Probation was revoked. Defendant claims his original sentence on Count 13 and the re-sentence on Count 13, imposed at his Violation of Probation hearing on October 15, 1993, constitute unconstitutional violations of his liberty interest. He requests appointment of counsel and an evidentiary hearing.

This court DENIES WITHOUT PREJUDICE all relief sought in Defendant's motion for the reasons that follow. The court treats the instant motion as an attempt to petition the court for a writ of habeas corpus and provides Defendant with an opportunity to refile his motion as a petition for habeas corpus or to withdraw or amend his motion. The court's order should not be construed as an expression of approval of Defendant's claims or requests for relief.

1. Procedural History

On October 21, 1988, Defendant pled guilty to eight counts of bank fraud, one count of possession of stolen bank matter, and one count of uttering a forged United States Treasury check. On December 7, 1988, Defendant was sentenced to seven years imprisonment and five years probation. Defendant was represented at sentencing by Attorney Jeffrey Staniels of the Federal Defender Association of Philadelphia. On October 4, 1989, this court denied Defendant's petition for habeas corpus pursuant to 28 U.S.C. § 2255. United States v. Greene, 722 F.Supp. 1221 (E.D.Pa. 1989) (Broderick, J.). On October 15, 1993, this court found Defendant in violation of probation and sentenced him to five years imprisonment. Defendant was represented at his violation of probation hearing by Attorney Rossman Thompson, also of the Federal Defenders Association of Philadelphia. On September 29, 1994, the United States Court of Appeals for the Third Circuit affirmed the revocation of Defendant's probation. United States v. Greene, No. 93-1998 (3d Cir. Sept. 29, 1994) (39 F.3d 1172 (Table)). On July 18, 1995, this court denied Defendant's motion to correct, vacate, or reduce the sentence of five years imprisonment imposed upon revocation of his probation. That decision was affirmed by the third circuit. United States v. Greene, No. 95-1636 (3d Cir. Mar. 26, 1996) (82 F.3d 407 (Table)).

2. The Writ of Habeas Corpus Generally

The Antiterrorism and Effective Death Penalty Act of 1996 (commonly known as "AEDPA," and codified as 28 U.S.C. §§ 2241-2266) deals with the right of all persons in state custody, or in federal custody, to file a petition in a federal court seeking the issuance of a writ of

habeas corpus. If such a writ of habeas corpus is issued by a federal court, the prisoner will be released from either state custody or federal custody (as the case may be) on the grounds that his rights guaranteed by the United States Constitution have been violated; habeas corpus motions pursuant to AEDPA are the only possible means of obtaining this type of relief from custody. Benchoff v. Colleran, 404 F.3d 812 (3d Cir. 2005); Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2003); Coady v. Vaughn, 251 F.3d 480, 484-85 (3d Cir. 2001); In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997).

By means of AEDPA, Congress provided that, in the context of a petitioner who is in custody pursuant to a federal judgment, a writ of habeas corpus may issue pursuant to 28 U.S.C. § 2255 (and not pursuant to 28 U.S.C. § 2241) for constitutional attacks on the imposition of a federal conviction and/or a federal sentence. Okereke, 307 F.3d at 120; Cradle v. United States ex rel Miner, 290 F.3d 536, 538-39 (3d Cir. 2002); Coady, 251 F.3d at 485-86; In re Dorsainvil, 119 F.3d at 249-52. Through AEDPA, Congress provided that, in the context of a petitioner in custody pursuant to a federal judgment, a writ of habeas corpus may issue pursuant to 28 U.S.C. § 2241 (and not pursuant to 28 U.S.C. § 2255) for attacks on the Constitutionality of the execution of a federal sentence (that do not attack the imposition of a federal conviction and/or federal sentence). Id.

By means of AEDPA, Congress also intentionally created a series of restrictive gate-keeping conditions that must be satisfied for a prisoner to prevail in his petition seeking the issuance of a writ of habeas corpus. One such restrictive gate-keeping condition is AEDPA's strict and short statute of limitations. Another one of these restrictive gate-keeping conditions is AEDPA's "second or successive rule," which generally forbids a litigant from filing a 28 U.S.C.

§ 2255 habeas if that litigant had a prior 28 U.S.C. § 2255 habeas (attacking the same federal conviction and/or sentence) which was dismissed with prejudice.

2. Recharacterization of Defendant's Motion as a Petition for Habeas Corpus

A federal court may recharacterize a motion by a pro se litigant to place it within a different legal category. United States v. Castro, 540 U.S. 375, 381 (2003); In re Wagner, 421 F.3d 275, 277 (3d Cir. 2005). It is unclear whether Defendant seeks to petition the court for a writ of habeas corpus pursuant to 28 U.S.C. §2241 or 28 U.S.C. §2255. However, insofar as Defendant claims 1) ineffective assistance of counsel at this violation of probation hearing and 2) unlawfulness of the original sentence from his conviction on Count 13 of the indictment, Defendant attacks the constitutionality of the sentence of imprisonment imposed upon him upon this court's finding that he violated probation. Accordingly, the instant motion seeks relief that is only available pursuant to 28 U.S.C. § 2255. See Okereke, 307 F.3d at 120; Coady, 251 F.3d at 485-86; In re Dorsainvil, 119 F.3d at 249-52. That relief pursuant to 28 U.S.C. § 2255 may possibly be barred pursuant to AEDPA's second or successive rule or pursuant to AEDPA's statute of limitations does not mean that an alternate route to this type of relief is available pursuant to 28 U.S.C. § 2241. Okereke, 307 F.3d at 120; In re Dorsainvil, 119 F.3d at 251.

This court may not re-characterize a pro se motion as a 28 U.S.C. § 2255 petition without first:

1. notifying the petitioner that the court believes it is really a § 2255 petition purporting to be something else;
2. warning the petitioner of all of the ramifications of AEDPA (including, but not

limited to, the AEDPA statute of limitations, as well as the second or successive rule created by AEDPA);

3. getting permission from the prisoner to re-characterize the petition as a 28 U.S.C. § 2255 petition; and
4. informing the petitioner that he also has the option to voluntarily withdraw or amend his submission so that it contains all the § 2255 claims he believes he has.

United States v. Castro, 540 U.S. at 377, 383; In re Wagner, 421 F.3d at 278; United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999).

Assuming that Defendant consents to the aforesaid recharacterization, then pursuant to Local Civil Rule 9.3(a), and Rule 2 of the Rules Governing 28 U.S.C. § 2255 Proceedings in the United States District Courts, this petition was not filed with the requisite current standard 28 U.S.C. § 2255 form, prescribed by this court, effective December 1, 2004. Aside from the dictate of the aforesaid rules of court, use of this court's current standard form in 28 U.S.C. § 2255 habeas cases is necessary so as to guarantee that the defendant is made aware of the specific warnings required from this district court at the commencement of any 28 U.S.C. § 2255 habeas case pursuant to United States v. Thomas, 221 F.3d 430, 436 (3d Cir. 2000) (relating to the strict and short statute of limitations that exists for filing a 28 U.S.C. § 2255 petition), and Miller, 197 F.3d at 652 (relating to the strict restrictions on filing a second or successive 28 U.S.C. § 2255 petition). These specific Thomas and Miller warnings are contained in the introductory text of this court's aforesaid current standard § 2255 form. Because all district courts within the Third Circuit are required to give petitioners in § 2255 cases these Thomas and Miller warnings at the time of filing, this court cannot waive the form requirements of Local Civil Rule 9.3(a).

Accordingly, this 3<sup>rd</sup> day of December 2007, it is hereby **ORDERED** as follows:

1. Defendant's pro se Nunc Pro Tunc Motion to Correct Illegal Sentence (Docket No. 87) is DENIED WITHOUT PREJUDICE.
2. The Clerk of Court shall furnish Defendant with a blank copy of this court's current standard form for filing a petition pursuant to 28 U.S.C. § 2255. The Clerk of Court shall issue a civil action number for any petition under 28 U.S.C. § 2255 filed by Defendant.
3. Defendant shall notify this court within sixty (60) days whether he consents to the reclassification of his motion as a 28 U.S.C. § 2255 petition, and, if he does consent to such reclassification, he shall complete the enclosed 28 U.S.C. § 2255 form and return it to this court.
4. Any 28 U.S.C. § 2255 form filed by Defendant within sixty (60) days shall be deemed filed as of the date of filing of the instant motion.
5. If he does not consent to reclassification of his motion as a 28 U.S.C. § 2255 petition, Defendant shall withdraw or amend the instant motion within sixty (60) days.

BY THE COURT:

S/ James T. Giles

J.